

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Factfinding and Super Conciliation

Proposed Amendment and Proposed New Rule: N.J.A.C. 19:12-4.3 and 19:12-4.4

Authorized by: Public Employment Relations Commission,
Millicent A. Wasell, Chair

Authority: N.J.S.A. 34:13A-11 and P.L. 2003, c. 126

Calendar reference: See Summary for explanation of exception to calendar requirement

Proposal Number: PRN_____

Submit comments by November 1, 2003 to:
Millicent A. Wasell, Chair
Public Employment Relations Commission
P.O. Box 429
Trenton, New Jersey 08625-0429

Summary

The New Jersey Legislature has enacted a statute, P.L. 2003, c. 126, supplementing the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. That statute calls for a super conciliation process to follow unsuccessful fact-finding in negotiations between majority representatives and school boards or other educational employers covered by the bill. The statute authorizes the Public Employment Relations Commission to adopt regulations specifying the qualifications and procedures governing the agency's appointments of super conciliators.

The proposed amendment to N.J.A.C. 19:12-4.3 expressly specifies that the Commission or the Director of Conciliation may appoint a super conciliator in the event of a continuing impasse after fact-finding.

The proposed new rule, N.J.A.C. 19:12-4.4, provides for the filing of a request for the appointment of a super conciliator and the appointment of a super conciliator by the Director of Conciliation. The rule also sets forth the qualifications required of super conciliators; incorporates the powers granted to super conciliators by P.L. 2003, c. 126; and protects the confidentiality of the super conciliation process.

As the Commission has provided a 60-day comment period in this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3(a)5.

Social Impact

The proposed amendment and the proposed new rule will allow the Commission to implement the provisions of P.L. 2003, c. 126, concerning the super conciliation process

promptly and smoothly.

Economic Impact

The proposed amendment and the proposed new rule do not impose any economic costs on the parties to the negotiations process, the public, or the State.

Federal Standards Statement

The proposed amendment and the proposed new rule are proposed under the authority of the New Jersey Employer-Employee Relations Act and are not subject to any federal statutes, regulations, or standards. Therefore, a federal standards analysis is not required.

Jobs Impact

The proposed amendment and proposed new rules should not result in the loss or generation of jobs.

Agriculture Industry Impact

The Commission's jurisdiction is limited to employer-employee relations in public employment and the proposed amendment and proposed new rule apply only to school boards and other educational employers covered by P.L. 2003, c. 126. The proposed amendment and the proposed new rule therefore impose no requirements on the agricultural industry.

Regulatory Flexibility Statement

The Commission's jurisdiction is limited to employer-employee relations in public employment and the proposed amendment and proposed new rule apply only to school boards and other educational employers covered by P.L. 2003, c. 126. The proposed amendment and the proposed new rule therefore impose no requirements on small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Smart Growth Impact

The proposed amendment and the proposed new rule will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Full text of the proposed amended rule and proposed new rule follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

CHAPTER 12

NEGOTIATIONS AND IMPASSE PROCEDURES; MEDIATION, FACT-FINDING, SUPER CONCILIATION, AND GRIEVANCE ARBITRATION

SUBCHAPTER 1. PURPOSE OF PROCEDURES

19:12-1.1 Purpose of procedures

N.J.S.A. 34:13A-5.4(e) provides that the Commission shall adopt such rules as may be required to regulate the time of commencement of negotiations and of institution of impasse procedures so that there will be full opportunity for negotiations and the resolution of impasse prior to required budget submission dates. Further, N.J.S.A. 34:13A-6(b) provides that whenever negotiations between the public employer and exclusive representative concerning the terms and conditions of employment shall reach an impasse, the Commission is empowered upon the request of either party to provide mediation to effect a voluntary resolution of the impasse, and in the event of a failure to resolve the impasse by mediation, to recommend or invoke fact-finding with recommendation for settlement. Accordingly, the provisions of this chapter establish a mandatory time period for the commencement of negotiations, utilizing the public employer's required budget submission date as a definitive reference point to afford the parties a full opportunity for negotiations and resolution of impasses which are reached prior to the required budget submission date and for utilization of impasse procedures for parties who reach impasse during alternative time periods. N.J.A.C. 19:12-2.1 through 19:12-4.3 do not apply to negotiations between a public fire or police department as defined by N.J.S.A. 34:13A-15 and an exclusive representative. See N.J.A.C. 19:16.

SUBCHAPTER 2. COMMENCEMENT OF NEGOTIATIONS

19:12-2.1 Commencement of negotiations

(a) The parties to a collective negotiations agreement shall commence negotiations for a successor agreement, or in the case of an agreed reopener provision shall commence negotiations pursuant to such reopener provision, no later than 120 days prior to the public employer's required budget submission date. The term "required budget submission date" shall refer to the first budget implementing the successor agreement or the agreement pursuant to the reopener provision, as the case may be. In circumstances where the Commission has not determined the public employer's required budget submission date, the public employer shall notify the employee representative in writing of the required budget submission date no later than 150 days prior to such date. The foregoing provisions shall not preclude the parties from agreeing to the automatic renewal of the collective negotiations agreement unless either party shall have notified the other party of its intention to terminate or modify the agreement, nor shall

it preclude the parties from establishing by mutual agreement an alternative date for the commencement of negotiations.

(b) The party initiating negotiations shall, no later than 15 days prior to the commencement date of negotiations required by this section or any alternate commencement date agreed to by the parties, notify the other party in writing of its intention to commence negotiations on such date.

(c) Nothing in this section shall be construed to abrogate or alter obligations of parties to newly established collective negotiations relationships, whether created by recognition or by certification.

SUBCHAPTER 3. MEDIATION

19:12-3.1 Initiation of mediation

(a) In the event that a public employer and a certified or recognized employee representative have failed to achieve an agreement through direct negotiation, either the public employer, the employee representative, or the parties jointly, may notify the Director of Conciliation, in writing, of the existence of an impasse and request the appointment of a mediator. An original and four copies of such notification and request shall be filed and shall be signed and dated and shall contain the following information.

1. The name and address of the public employer who is a party to the collective negotiations; the name, address, telephone number, and title of its representative to be contacted; and the name, address and telephone number of any attorney/consultant representing the public employer;

2. The name and address of the employee representative who is a party to the collective negotiations; the name, address, telephone number, and title of its representative to be contacted; and the name, address and telephone number of any attorney/consultant representing the employee representative;

3. A description of the collective negotiations unit, including the approximate number of employees in the unit;

4. The dates and duration of negotiations sessions;

5. The termination date of the current agreement, if any;

6. The public employer's required budget submission date;

7. Whether the request is a joint request; and

8. A detailed statement of the facts giving rise to the request, including all issues in dispute.

(b) A blank form for filing a request for the appointment of a mediator will be supplied upon request. Address requests to: Public Employment Relations Commission, P.O. Box 429, Trenton, New Jersey 08625-0429.

(c) Upon receipt of the notification and request, the Director of Conciliation shall appoint a mediator if he or she determines after investigation that mediation is not being resorted to prematurely, that the parties have been unable to reach agreement through direct negotiation, and that an impasse exists in negotiations concerning the terms and conditions of the employment of the affected employees.

19:12-3.2 Appointment of mediator

The mediator appointed pursuant to this subchapter may be a member of the Commission, an officer or employee of the Commission, a member of the Commission's mediation panel, or any other mediator, all of whom shall be considered officers of the Commission for the purpose of assisting the parties to effect a voluntary settlement. The parties may jointly request the appointment of a particular mediator, but the Director of Conciliation shall have the express reserved authority to appoint a mediator without regard to the parties' joint request if such is deemed to best effectuate the purposes of the act. If an appointed mediator cannot proceed pursuant to the appointment, another mediator shall be appointed. The appointment of a mediator pursuant to this subchapter shall not be reviewable.

19:12-3.3 Mediator's function

The function of a mediator shall be to assist all parties to come to a voluntary agreement. A mediator may hold separate or joint conferences as he or she deems expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between the parties. In the absence of an agreement between the parties, the mediator, at any time after appointment, may recommend to the Director of Conciliation that fact-finding procedures should be invoked.

19:12-3.4 Mediator's Confidentiality

Information disclosed by a party to a mediator in the performance of mediation functions shall not be divulged voluntarily or by compulsion. All files, records, reports, documents or other papers received or prepared by a mediator while serving in such capacity shall be classified as confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by him or her, on behalf of any party in any type of proceeding, under the New Jersey Employer-Employee Relations Act, as amended, including, but not limited to, unfair practice proceedings under N.J.A.C. 19:14.

19:12-3.5 Mediator's report

(a) The mediator shall submit one or more confidential reports to the Director of Conciliation which shall, in general, be limited to the following:

1. A statement of the dates and duration of the meetings which have been held and their participants;
2. A brief description of the unresolved issues which existed at the beginning of the mediation effort;
3. A statement of the issues which have been resolved through mediation;
4. A statement of the issues which are still unresolved, if any;
5. A recommendation as to whether or not the Director of Conciliation should invoke fact-finding with recommendations for settlement.

(b) The confidential report(s) submitted by the mediator may be utilized by the Director of Conciliation in considering whether or not fact-finding with recommendations for settlement should be invoked. Such reports shall not be considered in any other proceedings before the Commission or be made available or disclosed to any party or any other tribunal.

SUBCHAPTER 4. FACT-FINDING AND SUPER CONCILIATION

19:12-4.1 Initiation of fact-finding

(a) Upon a mediator's report of a failure to resolve the impasse by mediation, the Director of Conciliation may invoke fact-finding with recommendations for settlement and appoint a fact-finder. The public employer, the employee representative, or the parties jointly, may request the Director of Conciliation, in writing, to invoke fact-finding. An original and four copies of such request shall be filed, and shall be signed and dated and shall contain the following information.

1. The name and address of the public employer who is a party to the collective negotiations; the name, address, telephone number, and title of its representative to be contacted; and the name, address and telephone number of any attorney/consultant representing the public employer;
2. The name and address of the exclusive representative who is a party to the collective negotiations; the name, address, telephone number, and title of its representative to be contacted; and the name, address and telephone number of any attorney/consultant representing the employee representative;

3. The name of the mediator;
4. The number and duration of mediation sessions;
5. The date of the last mediation effort;
6. The unresolved issues to be submitted to a fact-finder; and
7. Whether the request is a joint request.

(b) Forms for filing a petition to request a fact-finding will be supplied upon request. Address requests to: Public Employment Relations Commission, P.O. Box 429, Trenton, New Jersey 08625-0429.

(c) In the absence of a joint request seeking the invocation of fact-finding, the non-filing party may submit a statement or response within seven days of receipt of the request for fact-finding, setting forth the following:

1. Any additional unresolved issues to be submitted to the fact-finder;
2. A statement as to whether it refuses to submit any of the issues listed on the request to invoke fact-finding on the ground that they are not within the required scope of negotiations; and
3. Any other relevant information with respect to the nature of the impasse.

(d) Proof of service on the petitioner of the respondent's statement shall be supplied to the Director of Conciliation. If a party has not submitted a response within the time specified, it shall be deemed to have agreed to the invocation of fact-finding as submitted by the requesting party.

19:12-4.2 Appointment of fact-finder

(a) Upon the invocation of fact-finding pursuant to this subsection, the Director of Conciliation shall communicate simultaneously to each party an identical list of names of three fact-finders. Each party shall eliminate no more than one name to which it objects, indicate its preference regarding the remaining names, and communicate the foregoing to the Director of Conciliation no later than the close of business on the third working day after the date the list was submitted to the parties. If a party has not responded within the time specified, all names submitted shall be deemed acceptable. The Director of Conciliation shall appoint a fact-finder giving recognition to the parties' preferences. The parties may jointly request the appointment of a particular fact-finder, including the person who was appointed as mediator, if any. Notwithstanding the foregoing provisions, the Director of Conciliation shall have the express

reserved authority to appoint a fact-finder without the submission of names to the parties, whenever he or she deems it necessary to effectuate the purposes of the act.

(b) The fact-finder appointed pursuant to this subchapter may be a member of the Commission, an officer or employee of the Commission, a member of the Commission's fact-finding panel, or any other fact-finder, all of whom shall be considered officers of the Commission for the purposes of assisting the parties to effect a voluntary settlement and/or making findings of fact and recommending the terms of settlement. If an appointed fact-finder cannot proceed pursuant to the appointment, another fact-finder shall be appointed. The appointment of a fact-finder pursuant to this subchapter shall not be reviewable.

19:12-4.3 Fact-finder's function

(a) The appointed fact-finder shall, as soon as possible after appointment, meet with the parties or other representatives, make inquiries and investigations, hold hearings, which shall not be public unless all parties agree to have them public, or take other steps deemed appropriate in order to discharge his or her function.

(b) For the purposes of such hearings, investigations and inquiries, the fact-finder shall have the authority and power to subpoena witnesses, compel their attendance, administer oaths, take the testimony or deposition of any person under oath, issue subpoenas duces tecum and require the production and examination of any governmental or other books or papers relating to any matter under investigation by or in issue before the fact-finder.

(c) Information disclosed by a party to a fact-finder while functioning in a mediatory capacity shall not be divulged by the fact-finder voluntarily or by compulsion. All files, records, reports, documents or other papers received or prepared by a fact-finder while serving in a mediatory capacity shall be classified as confidential. The fact-finder shall not produce any confidential records of, or testify in regard to, any mediation conducted by him or her, on behalf of any party in any type of proceeding under the New Jersey Employer-Employee Relations Act, as amended, including, but not limited to, unfair practice proceedings under N.J.A.C. 19:14.

(d) If the impasse is not resolved, the fact-finder shall make findings of fact and recommend the terms of settlement as soon after the conclusion of the hearing as possible.

(e) Any findings of fact and recommended terms of settlement shall be submitted simultaneously in writing to the parties and the Director of Conciliation.

(f) All individually incurred costs shall be borne by the party incurring them. The cost of the services of the fact-finder, including per diem expenses, if any, and actual and necessary travel and subsistence expenses, and any other necessary expenses of the fact-finding proceeding, shall be borne by the Commission unless mandated otherwise by subsequent legislation.

(g) The parties shall meet within five days after receipt of the fact-finder's findings of fact and recommended terms of settlement, to exchange statements of position and try to reach an agreement. In the event of a continuing impasse, the Commission or the Director of Conciliation may take whatever steps are deemed expedient to effect a voluntary settlement of the impasse[.], **including the appointment of a super conciliator.**

19:12-4.4 Appointment of a Super Conciliator

(a) In proceedings conducted pursuant to P.L. 2003, c. 126, if the employer and the majority representative do not reach a voluntary negotiated agreement within 20 days after the issuance of the fact-finder's report, the public employer, the employee representative, or the parties jointly may request the Director of Conciliation, in writing, to invoke super conciliation. An original and four copies of such request shall be filed, and shall be signed and dated and shall contain the following information:

1. The name and address of the public employer who is a party to the collective negotiations; the name, address, telephone number, and title of its representative to be contacted; and the name, address and telephone number of any attorney/consultant representing the public employer;

2. The name and address of the exclusive representative who is a party to the collective negotiations; the name, address, telephone number, and title of its representative to be contacted; and the name, address and telephone number of any attorney/consultant representing the employee representative;

3. Whether the request is a joint request.

(b) Forms for filing a petition to request a super conciliator will be supplied upon request. Address requests to: Public Employment Relations Commission, P.O. Box 429, Trenton, New Jersey 08625-0429.

(c) The parties may jointly request the appointment of a particular super conciliator, subject to the approval of the Director of Conciliation. Absent an approved joint request, the Director shall designate a super conciliator.

(d) The super conciliator appointed pursuant to this subchapter may be a member of the Commission, an officer or employee of the Commission, a member of the Commission's mediation or fact-finding panel, or any other super conciliator approved by the Director of Conciliation, all of whom shall be considered officers of the Commission for the purposes of assisting the parties to effect a voluntary settlement. If an appointed super conciliator cannot proceed pursuant to the appointment, another super conciliator shall be appointed. The appointment of a super conciliator pursuant to this subchapter is not reviewable.

(e) The super conciliator shall have the authority to exercise the powers granted by P.L. 2003, c. 126 to institute non-binding procedures deemed appropriate to resolve the parties' negotiations impasse.

(f) The super conciliator, while functioning in a mediatory capacity, shall not be required to disclose any files, records, reports, documents, or other papers classified as confidential which are received or prepared by him or her or to testify with regard to mediation conducted under the Act. Nothing contained herein shall exempt an individual from disclosing information relating to the commission of a crime.